

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A243/17

In the matter between:

STREAKS AHEAD INVESTMENTS (PTY) LIMITED

First Appellant

BOROKA FILLING STATION CC

Second Appellant

ERF 344 ONTWIKKELING (PTY) LIMITED

Third Appellant

and

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

27/03/19
DATE


SIGNATURE

LEPELLE INDUSTRIAL AND MINING SUPPLIES CC First Respondent

MINISTER OF ENERGY NATIONAL GOVERNMENT Second Respondent

CONTROLLER OF PETROLEUM PRODUCTS Third Respondent

BA-PHALABORWA LOCAL AUTHORITY Fourth Respondent

MEC, DEPARTMENT OF ECONOMIC DEVELOPMENT,
ENVIRONMENT & TOURISM, LIMPOPO PROVINCE Fifth Respondent

MEC FOR LOCAL GOVERNMENT AND HOUSING
LIMPOPO GOVERNMENT Sixth Respondent

REGISTRAR OF DEEDS Seventh Respondent

JUDGMENT

By the Court:

- 1 This is an appeal against two decisions of Baqwa J, in separate but related applications, both under case no. 76409/17. The appeals are brought with the leave of the learned judge below.
- 2 The whole case arises because the present first respondent (Lepelle) and the present second appellant (Boroka) operate filling stations in Namakgale district in Phalaborwa, where they compete for the custom of the public. They are both retailers of petroleum products, such as petrol, diesel and engine oil.
- 3 The first decision arose from an application for an interim interdict. Lepelle won the interdict application. An order was made interdicting Boroka from carrying on its retail business. In the second decision, Boroka was found guilty of contempt of court in contravening the order made in the interdict application.
- 4 In Part A of the notice of motion for interdict relief, dated 15 October 2014, brought by Lepelle as applicant against the appellants (Streaks, Boroka and Erf 344 respectively) and all the other parties who feature as respondents in this appeal, Lepelle sought wide ranging relief. The

relief sought was expressed to operate pending various other proceedings, ie appeals against the decision of the fourth respondent (the Controller) to grant Streaks a site license and to grant Boroka a retail license, a judicial review (at that stage not yet instituted) and final relief under a separate Part B of the notice of motion.

- 5 The notice of motion sought, in relation to erf 3465 in township Namakgale B (the property), an interdict against any construction or trading activities or retail activities or selling of petroleum products or conducting of business of any nature.
- 6 The statute whose interpretation lies at the heart of the present appeal is the Petroleum Products Act.¹ Broadly speaking, the policy of the measure is that in order for a filling station such as those conducted by the competing parties to be operated lawfully, two licenses must be in place. The first is a site license which empowers the holder to hold and develop a site on which retail sales of petroleum products may take place. The second is a retail license, which empowers the actual retail sales of such products, mostly to the motoring public. Much more about these licenses and the legal consequences of their policy interconnectedness will follow.

- 7 As in the court below, only Lepelle, Streaks, Boroka and Erf 344 were represented and presented argument before us. The other respondents either abided or did not oppose.
- 8 To understand the background to the interdict application, we must begin in 2006. Streaks, acting through town planners and other professionals was interested in developing the property. Streaks wanted to put up a shopping complex and engaged the authorities for this purpose. The authorities agreed. Streaks bought and in 2008 took transfer of the property. In 2008, Streaks applied for permission to put up the shopping complex and, on a proposed subdivided portion of erf 3465, a service station. In the same year, the provincial authorities approved the use of the property as a shopping complex.
- 9 By 2010, negotiations between Streaks and Total South Africa towards a service station lease on a portion of the property had reached an advanced stage.
- 10 In 2012, Streaks both sold the property to Erf 344 and leased it to Boroka. The lease makes clear that Boroka intended to operate a filling station on the property. In 2013, Streaks transferred the property to Erf 344, which then developed the property and leased out portions of the property to various traders..

- 11 Parallel to these transactions, on 26 November 2012, Streaks applied for what the PPA calls a site license and Boroka applied for a retail license. On 7 April 2013 Lepelle and at least one other objected to the grant of these two licenses. Despite the objections, the site and retail licenses were granted on 16 July 2013.
- 12 On 15 August 2013, Lepelle became aware that the licenses had been granted. It began accumulating documents and information with a view to mounting legal challenges to the legitimacy of the licenses. Lepelle first made use of administrative remedies by lodging internal appeals to the second respondent (the Minister). Its first internal appeal was lodged on 17 October 2013. These appeals failed, from Lepelle's perspective, to bear fruit. Lepelle then instituted the interdict application in the court below.
- 13 By this stage, both the shopping complex and Boroka's filling station were up and running. The shopping complex on the property opened for business in September 2013. Boroka began selling petroleum products on the property on about 22 May 2014.
- 14 Lepelle's founding affidavit included over 50 pages of factual allegations. Because of the way the case developed, we need not

analyse these allegations in any detail. Lepelle itself however summarises the case it (initially) sought to present as follows:²

[Lepelle] is not the current owner of the property and cannot be the site license holder;

[T]he filling station was constructed without the necessary valid environmental authorisation or site licence;

[T]he environmental authorisation was applied for and approved on property that does not exist in law;

[T]he filling station was constructed contrary to the town planning scheme of the local authority and the zoning namely "business one";

[T]he construction of the filling station was commenced ... without any building plans having been authorised by the local authority;

[T]he condition in the current title deed was incorporated therein referring to the property being capable of [being] utilised only for trading purposes - which was done unlawfully;

[A]ny current trading on the premises of petroleum products and any other products will be unlawful;

[T]he Controller approved the site license application due to a clear misrepresentation made to Ms. Keketi, that the ROD had not lapsed at the time of her enquiry as to its remaining validity;

[T]he construction of the filling station and the streaming of the site occurred without a valid site or retail licence having been issued for such activities.

- 15 The present appellants, as respondents in the court below, answered Lepelle's founding affidavit comprehensively on the facts and criticised Lepelle for, amongst other things, not utilising numerous internal remedies other than those which we have mentioned. The internal remedies which Lepelle did utilise were all specifically directed to the Minister and attacked the probity of the site and retail licenses. For present purposes, we need say no more than that on the factual challenges, relating to zoning, permitted use, alleged misrepresentation and the like as set out in the preceding paragraph, there is no balance of probabilities in favour of Lepelle and the final word on these matters must be left to the reviewing court to determine.
- 16 Lepelle's case was significantly narrowed by statements made by it in its replying affidavit.³ Lepelle declared that the relief sought before the court below would be limited to an interdict prohibiting further construction of the filling station and the retail sale of petroleum products. The relief sought by Lepelle, it was said expressly, would therefore not affect the shopping centre. In apparent response to the internal remedy criticism we have referred to in the previous paragraph, Lepelle said the following:

The [present appellants'] contention that [Lepelle] has failed to make use of any of the numerous internal remedies, with regard to the various administrative processes, and further that [Lepelle] has also failed to initiate any review applications of any administrative decisions is misguided and incorrect. Ancillary relief in Part B is only necessary to achieve [Lepelle's] objective, namely to have the site and retail licenses set aside.

- 17 The court below was alive to what it described as the contested issues in the application but concluded, correctly, that they did not take the "real issue" between the parties any further in the light of an important admission made by the present appellants. It proceeded to determine this issue in favour of Lepelle and then, having regard to the balance of convenience, found for Lepelle.
- 18 The real issue can be identified in the light of appellants' counsel's concession. A site license may only lawfully be issued to the owner of the property upon which it is proposed that a filling station be constructed. Unless and until such a site license has been issued, no person may even begin constructing a filling station on the property in question. Because Streaks was not the owner of the property when the site license was granted, the site license was unlawfully issued and is invalid.

19 We pause to emphasise that the question whether the site license issued to Streaks should be set aside or whether, for example the court should allow the license to be transferred to the present owner of the property or postpone the operation of its order for relief pending proceedings to remedy the defect arising from the invalid site license is not before us. These are interim proceedings for an interdict. The ultimate remedy down the line arising from the invalidity of the site license is for that court to decide.

20 The question before us, however, relates to the legal consequence of the invalidity of the site license in a particular context. Lepelle contends that the invalidity of the site license carries with it the inevitable consequence that the retail license too is invalid. The present appellants, on the other hand, contend that the invalidity of the site license, *per se*, has no effect on the validity of the retail license. Despite the invalidity of the site license, say the appellants, the sale by Boroka of petroleum products is rendered lawful by the terms of its retail license. Absent an unlawful act, say the appellants, there can be no unlawful competition and therefore no interdict ought to have been granted.

21 It is implicit in the reasoning of the learned judge below that he resolved this issue in favour of Lepelle. For what follows, it is

important that we emphasise that the learned judge found that "no doubt can be thrown on [Lepelle's] case, be it from a factual or a legal basis" and that Lepelle had "established a clear right of review"⁴

- 22 The correctness or otherwise of the learned judge's conclusion that, as a matter of law, the retail license fell with the site license is in our view decisive of both the appeal in relation to the interdict and also to another question which was raised by the court to counsel before the hearing and addressed by counsel in both written and oral argument.
- 23 The latter question is whether the orders made by the learned judge in the interdict application are appealable at all. This arises because of a line of cases culminating in the decision in *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme*.⁵ The effect of this case is that under the common law, interim interdicts properly so called are not appealable. The label attached to the interdict is immaterial. What has to be determined is whether the interdict in question is in any respect final in substance.
- 24 We consider that in two respects the interdict, despite its form, was final in substance. Firstly, it disposed of the legal issue between the

⁴ Paras 20 and 39

⁵ 2018 6 SA 440 SCA

parties regarding the fate of the retail license when the site license failed. Secondly, the order of the court below closed Boroka's business entirely and for an indefinite period. There was no indication when adjudication of the various proceedings mentioned in the notice of motion would be concluded. This was therefore not a case where a respondent subject to an interim interdict had to adjust the way it did business (eg by refraining *pendente lite* from selling a certain product) but prevented the respondent from carrying on business at all.

25 Counsel for Lepelle expressly refrained from presenting oral argument on the appealability issue and left its determination in the hands of the court. We conclude that the interdict order of the court below is indeed appealable. We now move on to the determination of what in our view was correctly called the real issue between the parties.

26 The purposes of the Petroleum Products Act appear from s 2,⁶ which is headed Powers of Minister and others with regard to petroleum Products. We quote s 2 in full:

- (1) The Minister may by regulation or by notice in writing served on any person, whether personally or by post, and any person authorized thereto by the Minister may by such notice so served-

6

In what follows, all references to statutory material are to the PPA and certain Regulations made pursuant to s 2.

- (a) for the purposes of ensuring a saving in, and the efficient use of, petroleum products, regulate in such manner as he or she may deem fit, including the imposition upon any person of any duty in connection therewith, or prohibit-
 - (i) the use of any petroleum product for any purpose specified in the regulation or notice, as the case may be, or for the performance of any act so specified in a manner so specified;
 - (ii) the purchase, sale, supply, acquisition, possession, disposal, storage or transportation or the recovery and re-refinement of any petroleum product so specified;
- (b) for the purposes of ensuring an economy in the cost of distribution of petroleum products or the rendering of a service of a particular kind or of services of a particular standard, regulate in such manner as he may deem fit, or prohibit-
 - (i) the supply to any person of any equipment intended for the dispensing of any petroleum product;
 - (ii) the establishment or creation of an outlet for the sale of any petroleum product;
 - (iii) the transfer from one place to another of any business or undertaking conducted at an outlet;
 - (iv) the change of suppliers of petroleum products to any business or undertaking conducted at any outlet;
 - (v) the rendering of any service;
 - (vi) the supply of petroleum products to any business or undertaking conducted at any outlet at which any service of a particular kind or a service of a particular standard is not available to the public;
- (c) prescribe the price, or a maximum or minimum price, or a maximum and minimum price, at which any petroleum product may be sold or bought by any

person, and conditions under which the selling or buying of petroleum products other than in accordance with the prescribed, maximum or minimum price may take place;

- (d) regulate in such manner as he may deem fit, or prohibit, any business practice, method of trading, agreement, arrangement, scheme or understanding which, in the opinion of the Minister, is calculated-
 - (i) to influence, or which may have the effect of influencing, directly or indirectly, the purchase or selling price of petroleum products at any outlet; or
 - (ii) to cause, or which may have the effect of causing, directly or indirectly, an increase in the price referred to in paragraph (c);
- (e) regulate in such manner as he may deem fit the supply of any petroleum product to any business or undertaking conducted at any outlet, including the imposition of conditions relating to the price at which such product may be sold to such business or undertaking or at such outlet, or prohibit such supply.
- (f) oblige any person to publish the prices at which petroleum products are available for sale including conditions relating to the frequency of such publications, its content and structure, the method and manner of its publication and the displaying thereof;
- (g) prescribe the quantities of crude oil or petroleum products to be maintained by any person.
- (2) Different regulations or notices may be issued under subsection (1) in respect of different classes or kinds of petroleum products or services or different persons or categories or groups of persons.

27 Section 2 confers very wide powers on the Minister to control and regulate the use of and trade in petroleum products.⁷ The section contemplates that aspects of the petroleum products industry will be conducted by businesses or undertakings, thereby establishing the statutory foundation for the creation and operation of the many filling stations throughout South Africa.

28 These conclusions are reinforced by the provisions of ss 2B and 2C. In what follows, we deal with the issuing of licenses under the Act. In the consideration of whether a specific license should be issued, effect must be given to certain objectives. These are promoting an efficient manufacturing, wholesaling and retailing petroleum industry; facilitating an environment conducive to efficient and commercially justifiable investment; the creation of employment opportunities and the development of small businesses in the petroleum sector; ensuring countrywide availability of petroleum products at competitive prices; and promoting access to affordable petroleum products by low-income consumers for household use;⁸ and the promotion of the advancement of historically disadvantaged South Africans.⁹

⁷ *Petroleum product* is defined in s 1. It means any petroleum fuel and any lubricant, whether used or unused, and includes any other substance which may be used for a purpose for which petroleum fuel or any lubricant may be used.

⁸ Section 2B(2)

⁹ Section 2C(a). Section 2C also requires the consideration of a Charter said to be in Schedule 1 to the PPA. The affidavits do not include the Charter. We were not

29 For the purpose of controlling the use and trade in petroleum products, s 2 provides the Minister with two mechanisms. The Minister has the power, firstly, to regulate (ie promulgate regulations) generally; and, secondly, the power to address specific situations by notice served on a person or persons. The Minister may also authorise others to exercise the powers specified in such a notice. Section 6 expressly confers on the Minister the power to delegate any of his powers to any person and subject to any condition. Specific instances of the power to regulate, without derogating from the general power, are set out in s 12C.

30 It is important to emphasise that the PPA itself envisages that the purposes of the Act may be achieved through regulation and through notices. It is difficult to conceive of any aspect of the industry that the Minister cannot, notionally, regulate.

31 The third respondent, the Controller of Petroleum Products (the Controller) is an important functionary within the scheme of administration of the PPA. The Controller is appointed by the Minister under s 3(a). Section 3 also makes provision for the appointment of regional controllers and inspectors.

32 The PPA contemplates, as a primary mechanism for achieving the objects of the Act, a system of licenses. Under s 2A(1), specific categories of activities may, in general, not be conducted except under a license issued by the Controller. The text of s 2A(1) reads:

(1) A person may not-

- (a) manufacture petroleum products without a manufacturing licence;
 - (b) wholesale prescribed petroleum products without an applicable wholesale licence;
 - (c) hold or develop a site without there being a site licence for that site;
 - (d) retail prescribed petroleum products without an applicable retail licence,
- issued by the Controller of Petroleum Products.

33 The manufacture of and wholesale trade in petroleum products are outside the scope of this judgment. We are concerned with the licenses contemplated in ss 2A(1)(c) and (d).

34 The license contemplated in s 2A(1)(c) is called in the subsection itself a site license. A site license empowers a person to *hold or develop a site*. *Site license* is not defined in the PPA but *site* is defined to mean premises on land zoned and approved by a competent authority for

the retailing of prescribed¹⁰ petroleum products. *Hold*, when used in relation to land, is defined to mean the owning of land for the purpose of establishing a site.

35 Except in the case of publicly owned land, a situation outside the scope of this judgment, s 2A(4)(b) requires that the person who has to apply for a site license must be the owner of the property concerned.¹¹

36 Section 2A(1)(d) provides for retail licenses. A *retail license* empowers the holder to *retail prescribed petroleum products*. *Retail* is defined to mean the sale of petroleum products to an end-user at a site. *Retailer* has a corresponding meaning.

37 We said that the general position was that activities identified in s 2A(1) may not be carried on except under license. Under s 2A(2)(a), if a person engages in an activity contrary to s 2A(1), the Controller must direct that person to cease such activity forthwith. However,

¹⁰ *Prescribed* is defined in the PPA to mean prescribed by regulation made by the Minister.

¹¹ The basis upon which the appellants conceded that the site license in this case was invalidly issued was that although Streaks was the owner of the property concerned when it made application for the site license, it was not the owner when the license was issued. Lepelle contended that there were other grounds upon which we might find that the site license had been invalidly issued. Even if this contention of Lepelle were correct, it would take the present case no further.

under s 2A(2)(b), the Controller may allow a person contemplated in s 2A(2)(a) to continue with the very activity which the Controller has directed should be ceased, pending an application and the issuing of a license if the cessation of such an activity is likely to lead to a material interruption of the supply of petroleum products.

- 38 If any such application for permission to continue pending an application and the issuing of a license is unsuccessful, the Controller must direct the person affected to comply with the license and, if applicable, rectify any state of affairs resulting from such contravention within the period stipulated by the Controller.
- 39 Under s 2A(3), if a person engages in an activity in contravention of a license issued to that person, the Controller must direct that person to comply with the license and, if applicable, rectify any state of affairs resulting from such contravention within the period stipulated by the Controller.
- 40 The provisions of s 2B(3) stand in apparent conflict with those in s 2A(3). Section 2B(3) provides that a license issued by the Controller remains valid for as long as:

- (a) the licensee complies with the conditions of the licence;

- (b) the licensed activity remains a going concern, excluding a site; and
- (c) in the case of a site, there is a corresponding valid retail licence.

41 We consider the effect of s 2B(3)(c) below.

42 We have remarked that the PPA itself empowers the Minister to make regulations to give effect to the purposes of the Act. Counsel are agreed on the text of the Regulations relevant to this appeal.¹²

43 The Regulations prescribes the forms to be used for applications for site and retail licenses.¹³ Much information must be supplied by applicants for these licenses. The license applications of Streaks and Boroka respectively are before us. In applying for its site license, Streaks provided its personal particulars, an evaluation of the need for the development of the site, the extent to which Streaks claimed that the grant to it of a site license would promote the licensing objectives of the PPA, an analysis which demonstrated the viability of the proposed venture and the promotion of employment opportunities and its compliance with the Petroleum Charter. The Regional Director:

¹² Regulations Regarding Petroleum Products Site and Retail Licenses, published under GN R286 in Government Gazette 28665 of 27 March 2006 as amended by GN R1061 in Government Gazette 35984 of 19 December 2012

¹³ Regs 3 and 15 respectively.

Petroleum Licensing for Limpopo submitted a report supporting the site license application. The application showed that Streaks was the owner of the property and that the relevant authorities supported the zoning and permitted use changes required and had considered the environmental impact of the venture and approved it.

- 44 In its application for a retail license, Boroka provided its personal particulars, a motivation for the proposed retail activity and what it believed would be the likely economic viability of the retail venture, how the grant to it of a retail license would promote the licensing objectives of the PPA, the identity of its proposed wholesale fuel supplier and the terms of its contractual relationship with its supplier,¹⁴ the legal basis on which it would occupy the site,¹⁵ proof that it had available adequate start up funds, details of its anticipated staff complement,¹⁶ and proof of the approval of the proposed venture by zoning and permitted use authorities.

¹⁴ Total South Africa (Pty) Limited

¹⁵ A notarial lease with Streaks for 15 years or until Boroka had bought a minimum of 63 million litres of petrol and diesel from its wholesale supplier, with an option for a further five years. Boroka had to build and fit out the site at its own cost to enable it to trade as a retailer and maintain the site in good repair and pay the applicable rates and taxes.

¹⁶ Five women and 16 men, all previously disadvantaged persons.

45 We describe the detail of the applications to demonstrate that the licenses were not to be had for the mere asking and that considerable financial resources were required to enable Streaks and Boroka to create infrastructures adequate to give them any prospect of success in their applications. In addition to what we have described, guarantees for rehabilitation of the site were also provided.

46 It is clear from the scheme we have described that the Controller would not consider an application for a site license unless it was lodged together with an application for a corresponding retail license. Indeed, reg 3(1)(2) prescribes that the two applications must be lodged together. An applicant for a site license¹⁷ may not even commence with construction on the site until the Controller has granted a site license.

47 Notice of the applications must be extensively advertised.¹⁸ The Controller must verify both the information supplied and that the notices were published.¹⁹ The site and retail licenses, when granted, must be prominently displayed where any person entering the site might read them.²⁰

17 Other than an applicant who falls under s 2D, the transitional licensing provisions.

18 Regs 4 and 16

19 Regs 6 and 18

20 Reg 11

Regulations, the license does not *ipso facto* fail. The Controller is instead vested with the power to cancel or suspend the license.²⁴ Before the Controller may exercise this power, however, the Controller must follow the procedure prescribed by Reg 29(2). The licensee must be informed of the Controller's intention to cancel or suspend the license and the licensee must be given an opportunity to be heard. Thereafter the Controller must consider remedial steps taken by the licensee and all other relevant matters before the Controller decides whether to cancel or suspend.

50 The Regulations provide for three specific situations in which a site or retail license will cease to be valid.²⁵ These are: if the license is surrendered to the Controller; if the license is duly cancelled by the Controller; and if the licensed activity is no longer a going concern.²⁶

51 Specifically, false declarations do not *ipso facto* invalidate site or retail licenses. Here again, the Controller is vested with a power, where the

²⁴ Reg 29(1)

²⁵ Reg 30(1)

²⁶ Reg 30(1)(c). We heard argument on whether when the carrying on of a licensed activity is suspended by the court (eg where the license is interdicted from carrying on the activity), the licensed activity thereby "is no longer a going concern". It seems to us that there is room for the argument that such a cessation of the activity does not render the activity no longer a going concern for the purposes of the PPA. However, in light of the conclusion to which we have come, it is not necessary to decide this question.

award of a license was influenced by a false declaration, including a material non-disclosure, to act under Reg 29(2).

52 Against this policy scheme, we proceed to consider the question we posed in paragraph 20 above: whether, as Lepelle contends, the invalidity of the site license carries with it the inevitable consequence that the retail license too must fall.

53 In interpreting the PPA and the Regulations, we bear in mind that we must undertake a unitary exercise, having regard to the text of the measures, their purposes and the context in which the interpretation takes place. See *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁷ and the cases which followed this decision.

54 The first point we make in this regard is that the texts of the measures under consideration do not support Lepelle's contention. There is no provision in either the PPA or the Regulations which prescribes that if a site license is or becomes invalid, the corresponding retail license also becomes invalid.

55 Counsel for Lepelle urged us to find that the definition of *site* in s 1 of the PPA supported Lepelle's contention. The submission was that the

"competent authority" in "premises ... approved by a competent authority for the retailing of prescribed petroleum products" was the Controller. However, counsel's contention would make no grammatical sense. It would, for example, require us to interpret s 2B(3)(c) as meaning that the subparagraph should read

... in the case of a site on which there are premises approved by the Controller for the retailing of prescribed petroleum products, there is a corresponding valid retail license.

- 56 But the Controller approves the retailing of products by issuing a retail license. Lepelle's submission would also require s 2A(1)(c) to read that a person may not "hold or develop a site on which there are premises approved by the Controller for the retailing of prescribed petroleum products without there being a site license for that site". The subparagraphs read in this way would create an absurdity.
- 57 In our view, the reference to "competent authority" in the definition of "site" relates to the zoning, permitted use and environmental authorities and not to the Controller.
- 58 We therefore conclude that the text lacks any provision that supports Lepelle's contention. Indeed, it seems to us that s 2B(3)(c) is against Lepelle. That subparagraph provides in effect that a site license only

remains valid for as long as there is a valid retail license. There is no equivalent provision that provides that a retail license only remains valid for as long as there is a valid site license. This points toward a legislative intention to preserve the validity of a retail license in the event of a failure of the corresponding site license.

- 59 And indeed, there may well be good policy reasons why the Legislature did not link the validity of a retail license to the validity of the corresponding site license. The PPA contemplates that in relation to a specific site, the site and retail licenses may be held by different persons. It is difficult to see how the transformation purposes of the measure could be achieved if that were not the case. In this very instance, the site and retail licenses are held by different persons.
- 60 A site license may fail, or its provisions may be contravened, without any corresponding fault on the part of the retailer. A retailer might, and often would be, completely powerless to ensure that the conditions of the site license were adhered to. It would be a harsh and inequitable policy that put a retailer without more ado out of business because its landlord was no longer the holder of a valid site license.
- 61 Lepelle's contention would require us to find that the Legislature, by necessary implication, legislated for the automatic invalidity of a retail

license where the corresponding site license failed. We find against that contention. We hold that the Legislature did not legislate for the automatic invalidity of a retail license where the corresponding site license is or becomes invalid.

62 That brings us to the position of the Controller in the legislative scheme. The continuous supply of petroleum products to all those persons who use those products to drive their vehicles and manage their domestic lives is simply essential to the conduct of life and business in and the administration of South Africa. Without the continuous and efficient production and distribution of petroleum products, life in South Africa, as in most of the world, would be so impoverished that the institutions which govern the country would be unable to function and life itself would become unbearable. To ensure this purpose, the Legislature has opted for a scheme in which the Controller is empowered to deal with licensees on a case by case basis. The Act and the Regulations consistently confer very wide powers on the Controller to address situations in which there has been non-compliance with the PPA or the Regulations. As we have shown, the Regulations (through Reg 30) provide for termination of a license in only three situations. The Controller has the power to compound criminal conduct.²⁸ A powerful administrative tool is

provided to the Controller in the form of the power to issue directives²⁹ and the Controller may even allow a licensee to continue an activity in contravention of the PPA pending remedial measures to achieve compliance if by so doing a material interruption in the supply of petroleum products may be avoided or mitigated.

- 63 Having regard to the scheme and purposes of the Act, our view is that the mere fact that there is a non-compliance with a provision of a license or the absence of a site license corresponding to the applicable retail license (or vice versa) will not, under the PPA, of itself bring an end to the license concerned but will afford grounds for the Controller to intervene and use the powers conferred on this functionary under s 2A. This is, in our view, reinforced by the provisions of s 2B(5) under which, to ensure the continued operation of a licensed activity and the prevention of hardship, the Controller may, upon application, issue a temporary license.
- 64 It follows then, that the reference to validity in s 2B(3)(c) does not lead to the automatic termination of the site license in question when there is no corresponding valid retail license. The Controller is empowered to offer the holder of the site license an opportunity to remedy the

situation which arises when there is no corresponding valid retail license.

- 65 We therefore conclude that the purposes of the PPA and the Regulations would not be advanced by Lepelle's contention. The text of the legislation, its context and its purposes all point in the opposite direction. In our view, the question we posed regarding the real issue must be answered in favour of the present appellants. Boroka's retail license did not become invalid because of the invalidity of the corresponding site license.
- 66 By continuing to retail petroleum products where the corresponding site license was invalidly issued, Boroka is, we find, not acting unlawfully. There was therefore no unlawful competition. The application for the interdict should therefore not have succeeded and the appeal against the grant of the interdict must be upheld.
- 67 It is therefore unnecessary to address the question of balance of convenience. We would however say this: Lepelle has set out the inconvenience to itself if the interdict were not granted.³⁰ The considerations relied upon by Lepelle apply with equal force to Boroka. However, the grant of the interdict would mean that Boroka

would have to close down its business for a considerable period. That would be devastating to Boroka and to its employees. Closing down Boroka's business by order of court may mean that Boroka's licensed activity is no longer a going concern, and trigger the termination of its retail license under Reg 30(1)(c). The balance of convenience is therefore strongly in favour of Boroka.

- 68 The appeal against the order holding Boroka in contempt remains for consideration. The contempt application was brought by Streaks because Boroka refused to comply with the interdict order made by the learned judge below during the period from the date the interdict order was made until the present appellants delivered their notice of application for leave to appeal against the interdict order.
- 69 The defence put up by Boroka was that it had obtained legal advice that it need not obey the interdict order while it was considering whether it should appeal. That was however not the legal advice given to Boroka. No reputable lawyer would ever have given such advice. A mandatory court order such as the interdict must be obeyed from the instant it is made and until it is set aside, suspended or lapses on its own terms. In failing to comply with the interdict order, Boroka simply put commercial considerations ahead of its obligation to obey the order.

- 70 In addition to the contempt order, Streaks sought and obtained a declaration in the court below that the interdict order did not have the effect of a final judgment and a punitive costs order.
- 71 In the light of our findings the interdict was indeed in certain respects final in effect. The declaratory order of the court below must therefore be set aside. That means that Boroka was entitled to go to court to oppose the contempt application. Although the success enjoyed by Boroka in regard to the declaration does not constitute substantial success, it follows that the punitive costs order was inappropriate. Costs of the contempt application as between party and party should have been ordered.
- 72 Erf 344 contended that it ought to have been awarded punitive costs in the interdict application because there was no basis or seeking relief against it, once the true factual position had been established. If Erf 344 had confined itself to opposing the interdict application as restricted in Streak's replying affidavit on the simple ground that it was not a retailer of petroleum products, there might have been a basis for its contention regarding punitive costs. But Erf 344 made common cause in the fullest sense with the other appellants in opposing the interdict application. The legal questions arising from the invalidity of the site license were not straightforward. It cannot be said that Streaks

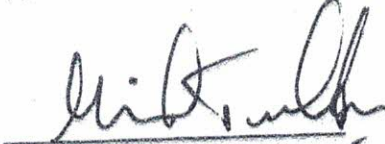
acted *mala fide* or inappropriately in bringing the interdict application.

We decline Erf 344's request for a punitive costs order.

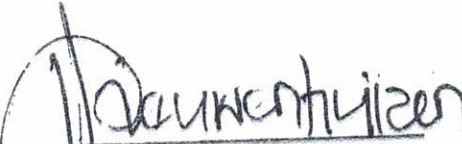
73 We accordingly make the following order:

- 1 The appeal against the interdict order of 25 November 2016 succeeds. The order of the court below is altered to read:
The application is dismissed. The applicant must pay the costs of the first, second and sixth respondents.
- 2 The first respondent on appeal, Lepelle Industrial and Mining Supplies CC, must pay the costs of the first, second and third appellants in relation to the appeal against the interdict order.
- 3 In relation to the contempt order of 15 December 2016:
 - 3.1 Paragraph 4 is set aside;
 - 3.2 The costs order in paragraph 5 is altered to read:
The second respondent is ordered to pay the costs of this application.
- 4 For the rest, the appeal against the contempt order is dismissed.
- 5 The second appellant must pay the costs of the first respondent on appeal, Lepelle Industrial and Mining Supplies CC, in relation to the appeal against the contempt order.

- 6 For the guidance of the Taxing Master, it is recorded that 75% of the time taken up by the arguments on appeal was devoted to the appeal against the interdict order.


NB Tuchten
Judge of the High Court
27 March 2019


EM Kubushi
Judge of the High Court
27 March 2019


N Janse van Nieuwenhuizen
Judge of the High Court
27 March 2019

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